In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1229

DANIEL THOMAS FALLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969. On April 4, 1969, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Selective Service Act is unconstitutional because Congress has exempted or deferred some categories of persons from compulsory military service.

2. Whether petitioner's sentence to five years' imprisonment for refusal to submit to induction is subject to appellate review.

STATEMENT

After a jury-waived trial in the United States District Court for the Northern District of Illinois petitioner was convicted of refusing to be inducted into the armed forces in violation of 50 U.S.C. App. 462. On January 19, 1968, he was sentenced to five years' imprisonment.

The evidence showed that on May 16, 1967, petitioner was examined and found acceptable for military service. On May 26, abandoning previous requests for deferment, petitioner requested 1A classification (Govt. Ex. B 11). It was stipulated that petitioner was ordered to report for induction on July 21, 1967, and that, upon reporting, he refused induction (R. 34-38).[1]

Petitioner testified that his refusal to submit to induction was wilfully and knowingly done (R. 46); that he was intent on committing an act of civil disobedience (R. 50). He believed the United States was

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[1] The trial transcript herein referred to as "R.", on file with the Clerk of this Court, consists of one volume.

violating treaties by fighting in Viet Nam (R. 53) and, was opposed to maintaining an army, especially a conscripted one (R. 90). He stated that he was an active member of CADRE, an acronym for Chicago Area Draft Resisters (R. 86-87), an organization which sought to hinder registration and to contact all registrants recently classified 1A and to give them advice (Govt. Ex. B 6, p. 7, R. 89). He declined a court proferred opportunity to be inducted (R. 91).

ARGUMENT

1. Petitioner asserts that the Selective Service Act is unconstitutional because it provides exemptions and deferments for various categories of persons, including women, limited service personnel, ministers, superannuated registrants, students, and those granted hardship and occupational deferments (Pet. 11-20). Comparable exceptions in the Draft Act of 1917 were sustained against challenge in the *Selective Draft Law Cases*, 245 U.S. 366. See, *id.* at 374-375, 389-390. That ruling is of course consistent with the general principle that the Constitution does not require that unequals be treated as equals. *Tigner* v. *Texas*, 310 U.S. 141, 147. Due process does not prohibit governmental classification or regulation, but demands only that the regulations shall not be unreasonable, arbitrary or capricious, and that the means selected to attain the desired objective shall have a real and substantial relation to the purpose of the statute. *Nebbia* v. *New York*, 291 U.S. 502; *Williamson* v. *Lee Optical Co.*, 348 US 483, 489; *Morey* v. *Doud*, 354 U.S. 457, 465; cf. *Levy* v. *Louisiana*, 391 U.S.

68. The exclusion of women and the various selective service classifications to which petitioner points as evidence of discrimination, are, on the contrary, evidence of a reasonable effort to provide a military force from those best able to serve without unnecessarily abandoning other important societal interests.

2. There is no occasion to reconsider the Court's ruling in *Blockburger* v. *United States*, 284 U.S. 299, that the extent of punishment, even if severe, is to be determined by the trial court "with whose judgment there is no warrant for interference on our part" (284 U.S. at 305). *United States* v. *Rosenberg*, 195 F.2d 583, 604 (C.A. 2), certiorari denied, 344 U.S. 838; see *Gore* v. *United States*, 357 U.S. 386, 393. It is generally held that a sentence within the limits of the statute is within the discretion of the trial court and cannot be changed by an appellate court. *Sibley* v. *United States*, 344 F.2d 103, 105 (C.A. 5), certiorari denied, 382 U.S. 945; *Stevens* v. *Warden, Maryland Penitentiary*, 382 F.2d 429 (C.A. 4), certiorari denied, 390 U.S. 1031; *Russell* v. *United States*, 288 F.2d 520 (C.A. 9), certiorari denied, 371 U.S. 926.

Exceptional circumstances may, in the opinion of an appellate court, warrant return of a case to the sentencing court to determine if an error was made. *Leach* v. *United States*, 334 F.2d 945 (C.A.D.C.); *United States* v. *Moody*, 371 F.2d 688, 693 (C.A. 6), certiorari denied, 386 U.S. 1003. Such remands, however, do not constitute reviews and reductions of sentence. See *Leach* v. *United States*, 353 F.2d 451 (C.A.D.C.), certiorari denied, 383 U.S. 917.

There was no error in the sentencing process in petitioner's case. There is no requirement that petitioner's sentence be uniform with those who committed similar offenses in the trial district (see Pet. 8). *Pennsylvania* v. *Ashe*, 302 U.S. 51, 53; *Burns* v. *United States*, 287 U.S. 216, 220. There is a fundamental difference between individual attention to a single defendant, as in the present case, and irrational discrimination in punishment between groups of offenders (see Pet. 8). Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541.[2]

Even assuming that petitioner's sentence was more severe than the sentence usually imposed in that district for failure to submit to induction, the record before the trial judge may well have convinced him that petitioner's case was more serious than the average. Petitioner admitted that he was an active participant in CADRE, an organization which had as one of its objectives: "Bringing about a direct open confrontation with the Selective Service System" (Gov. Ex. B-6). Moreover, it is clear on the record that this confrontation was not to be accomplished solely by legal means. Thus, one of the newsletters which CADRE published stated: "CADRE will encourage and support draft-card burning, induction refusal and nonregistration" (Gov. Ex. B-6). In these circumstances it was not inappropriate for the judge to impose on petitioner a sentence that was

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[2] *Skinner* involved irrational discrimination as to sterilization of recedivist offenders; embezzlers were exempt while thieves were not. Cf. also *McLaughlin* v. *Florida*, 379 U.S. 184, dealing with the irrational classification dependent upon race.

more severe than the average sentence in Selective Service cases.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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